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In The

Supreme Court of the United States

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., et al.,

Petitioners,

v.

THOMAS PETTERS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Mandatory Victims Restitution Act (MVRA) generally requires federal district courts to order as part of a criminal defendant's sentence "that the defendant make restitution to the victim of the offense." 18 U.S.C. § 3663A(a)(1). If a district court refuses to do so, the Crime Victim Rights Act allows victims to seek a writ of mandamus from a court of appeals. 18 U.S.C. § 3771(d)(3). "If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion." *Id.* The questions presented are:

1. Whether a sentencing court, confronted with the task of determining victims' losses pursuant to the MVRA, may deny restitution to the victims because it believes that the victims might be able to recoup their losses in an alternative forum.

2. Whether the Eighth Circuit's judgments denying mandamus relief should be reversed and remanded because it failed to provide any reasons for denying such relief, as required by 18 U.S.C. § 3771(d)(3).

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

This case arises from several related criminal prosecutions prosecuted in the U.S. District Court for the District of Minnesota by the United States.

Petitioners, parties that sought restitution in the courts below, are Ritchie Special Credit Investments, Ltd., Rhone Holdings II. Ltd., Yorkville Investments I, L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., Ritchie Capital Management, Ltd., Ritchie Multi-Manager Trading, Ltd., Ritchie Structured Multi-Manager, Ltd. Ritchie Multi-Manager Trading, Ltd., Ritchie Structured Multi-Manager, Ltd. and Ritchie Capital Management, L.L.C.

Respondents are Thomas Petters, Deanna Lynn Coleman, Robert Dean White, Michael Catain, Larry Reynolds, Harold Alan Katz, and Gregory Malcolm Bell, defendants in the criminal cases; and the United States of America, the plaintiff in the criminal prosecutions from which this case arises. Because this case arises out of mandamus petitions, the United States District Court of the District of Minnesota is nominally a respondent as well.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court rule 29.6, petitioners Ritchie Special Credit Investments, Ltd., Rhone Holdings II. Ltd., Yorkville Investments I, L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., Ritchie Capital Management, L.L.C., Ritchie Multi-Manager Trading, Ltd., Ritchie Structured Multi-Manager, Ltd., and Ritchie Capital Management, L.L.C. state that they do not have parent corporations or publicly held companies owning 10% or more of petitioner's stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of All Parties to the Proceedings Below	ii
Corporate Disclosure Statement	iii
Index to Appendix	v
Table of Authorities	vi
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved in this Case	1
Statement of the Case	2
Reasons for Granting The Writ	8
I. This Court Should Resolve The Circuit Split Over Whether Courts May Deny Restitution Based on the Availability of Other Remedies for Possible Victim Compensation	9
A. The Circuits Are Split Over This Issue	9
B. This Issue Is Extremely Important to the Proper Operation of the MVRA	14
C. The Courts Below Erred in Denying Restitution Based on the Possibility of Alternative Remedies	19

TABLE OF CONTENTS – Continued

Page

II. The Eighth Circuit Flouted The CVRA's Written-Opinion Requirement By Denying Petitioners' Mandamus Petitions Without a Written Opinion 22

Conclusion 25

INDEX TO APPENDIX

Decision of Eighth Circuit in 10-3050, September 24, 2010 ..... App. 1

Decision of Eighth Circuit in 10-2286, 10-2365, & 10-2582, August 3, 2010 ..... App. 3

Opinion of District Court in *United States v. Thomas Joseph Petters*, June 3, 2010 ..... App. 6

Opinion of District Court in *United States v. Robert Dean White, et al.*, June 4, 2010 ..... App. 19

Opinion of District Court in *United States v. Harold Katz, et al.*, July 2, 2010 ..... App. 21

Transcript of oral ruling in *United States v. Deanna Lynn Coleman*, September 2, 2010 ... App. 23

Statutes:

18 U.S.C. § 3663A ..... App. 31

18 U.S.C. § 3664 ..... App. 34

18 U.S.C. § 3771 ..... App. 43

TABLE OF AUTHORITIES

Page

CASES

Dolan v. United States, 130 S. Ct. 2533 (2010) 21

United States v. Aguirre-Gonzalez, 597 F.3d 46 (1st Cir. 2010).....15, 24

United States v. Alalade, 204 F.3d 536 (4th Cir. 2000) 11

United States v. Chalupnik, 514 F.3d 748 (8th Cir. 2008) 14

United States v. Cienfuegos, 462 F.3d 1160 (9th Cir. 2006) 10, 11

United States v. Collardeau, 2005 U.S. Dist. LEXIS 45020 (D.N.J. Apr. 28, 2005) 13

United States v. Dubose, 146 F.3d 1141 (9th Cir. 1998) 17

United States v. Edwards, 595 F.3d 1004 (9th Cir. 2010) 11

United States v. Gallant, 537 F.3d 1202 (10th Cir. 2008) 12, 13, 21

United States v. Hyde, 497 F.3d 103 (1st Cir. 2007) 12

United States v. Kenna, 453 F.3d 1136 (9th Cir. 2006) 24

United States v. Kline, 199 F. Supp. 2d 922 (D. Minn. 2002) 10

United States v. Kones, 77 F.3d 66 (3rd Cir. 1996) 6, 22

TABLE OF AUTHORITIES – Continued

Page

United States v. Perry, 360 F.3d 519 (6th Cir. 2004) 15

United States v. Petters, No. 08-CV-5348 ..... 5, 19

United States v. Reifler, 446 F.3d 65 (2d Cir. 2006) 14

United States v. Schwartz, 2006 U.S. Dist. LEXIS 33806 (D. Conn. May 25, 2006) 13

United States v. Vaknin, 112 F.3d 579 (1st Cir. 1997) 15

United States v. Warshak, 2008 U.S. Dist. LEXIS 85888 (S.D. Ohio Aug. 27, 2008) 13

STATUTES

18 U.S.C. § 1345 17

18 U.S.C. § 3663 (1982) 22

18 U.S.C. § 3663A 2, 12

18 U.S.C. § 3663A(a)(1) 20

18 U.S.C. § 3663A(a)(2) 4

18 U.S.C. § 3663A(c)(3)(B) 6, 10, 12, 20

18 U.S.C. § 3664 2

18 U.S.C. § 3664(f)(1)(A) 16

18 U.S.C. § 3664(f)(1)(B) 20

18 U.S.C. § 3664(j)(2) 11

18 U.S.C. § 3771 2

18 U.S.C. § 3771(a)(6) 16, 21

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 3771(d)(3) ..... *passim*

19 U.S.C. § 1619(a) 16

28 U.S.C. § 524(c)(1)(C) 16

CODE OF FEDERAL REGULATIONS

28 C.F.R. § 9.8(a)(5) 16

OTHER AUTHORITIES

150 Cong. Rec. S10912 23

LAW REVIEW ARTICLES

Jon Kyl et al., *On The Wings Of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581, 587 (2005) 23

PETITION FOR WRIT OF CERTIORARI

Ritchie Special Credit Investments, Ltd., et al., respectfully seek a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The orders denying relief from the Eighth Circuit (Pet. App. 1 and 3) are unpublished. The relevant opinions from the district court (Pet. App. 6, 19 and 21) are unpublished.

JURISDICTION

The Eighth Circuit issued its orders denying relief on August 3, 2010 and September 24, 2010. Pet. App. 1 and 3. On October 21, 2010 Justice Alito extended the deadline for this petition through December 1, 2010. No. 10A399. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Mandatory Victim Restitution Act ("MVRA") and Crime Victims Rights Act ("CVRA"), codified at

18 U.S.C. §§ 3663A, 3664 and 3771, respectively, are fully reproduced in the Appendix at pages 31-50.

STATEMENT OF THE CASE

Petitioners are several investment funds and the fund manager, who together lost over $165 million as a result of a multi-billion-dollar fraud scheme orchestrated by Thomas Petters. As direct and proximate victims of Petters and his convicted co-conspirators, petitioners were eligible for restitution under the Mandatory Victim Restitution Act ("MVRA") and the Crime Victims Rights Act ("CVRA"). Yet the district court refused to award such restitution, because "[a]t bottom" it believed that petitioners could pursue alternative remedies. Pet. App. 16. The Eighth Circuit then compounded this error, denying mandamus without a written opinion, in direct contravention of the CVRA's requirement that any denials of mandamus regarding restitution must be accompanied by a written opinion explaining why relief was denied.

1. In this case – often called the biggest Ponzi scheme before Madoff – Petters and his co-conspirators bilked their victims by borrowing huge sums evidenced by promissory notes. Petters had built a reputation as an astute and successful businessman in the wholesale "diverting" industry, and owned a number of well-known companies including Polaroid, Fingerhut, and Sun Country Airlines – giving him the credibility and clout to borrow huge

sums from banks and investment funds to leverage various transactions. But as victims later learned, over time, Petters' diverting business, PCI, had ceased making the large wholesale transactions in consumer goods and eventually became a complete fraud; there were no real products changing hands, nor profits being made. Money borrowed from new lenders was used to pay prior lenders.

Between February and May 2008, in the early throes of economic recession and in the midst of an historic credit crunch, petitioners loaned a total of $189 million to Petters and his companies in a series of short term notes, supported by assets of Polaroid Corporation, among other substantial collateral. When Petters' empire crumbled several months later, Petters and his companies owed Ritchie entities more than $165 million exclusive of accrued and unpaid interest. Concurrently with a raid on Petters' offices, the government commenced a civil fraud injunction action, and obtained orders freezing all of the assets of Petters and all of his co-defendants and appointing a receiver. The receivership order was soon amended to include a litigation stay, barring all lawsuits by creditors, victims or others against Petters, his co-defendants, and their companies. This litigation stay remains in effect today. The repeatedly stated purpose of the receivership is to preserve assets for victim restitution.

2. The United States brought federal criminal charges against Petters and his co-conspirators in the U.S. District Court for the District of Minnesota.

Early in the prosecution, the government identified petitioners as victims of Petters' fraud. When Petters' chief co-conspirator, Deanna Coleman, went to the U.S. Attorney's Office and offered her cooperation, she gave them a list of twenty-one institutional lenders, who were owed a total of $3.5 billion (including interest) under the promissory notes which formed the basis of the alleged fraud. Petitioners were on the list. The government's theory at Petters' trial was that Petters' fraud scheme was executed through the sale of these promissory notes from Petters' companies. Promissory notes that Petters issued to petitioners were the subject of testimony at Petters' criminal trial.

Petters was convicted of twenty counts of mail fraud, wire fraud, money laundering, and conspiracy. He was sentenced to 50 years in prison. His co-defendants – Deanna Coleman, Michael Catain, Larry Reynolds, Robert Dean White, Gregory Malcolm Bell, and Harold Alan Katz – all pleaded guilty to various fraud charges and received sentences ranging from 366 days to eleven years in prison. In their plea agreements, each of Petters' co-defendants had agreed that the MVRA "applies and that the Court is required to order the defendant to make restitution," and they asked that the government allow proceeds from any forfeited assets to be used for restitution.

3. The MVRA generally requires a sentencing court to impose restitution to all victims "directly and proximately harmed" as a result of the commission of the offense. 18 U.S.C. § 3663A(a)(2). In the lead case,

United States v. Petters, D. Minn. No. 08-364 (RHK/AJB), the district court outlined an *in camera* restitution claim and objection process, and set a date for a restitution hearing two months after Petters' sentencing. Petitioners and other putative victims filed victim impact statements and claims, and the U.S. Attorney's Office compiled preliminary and final proposed restitution orders. The government included petitioners among its proposed restitution list.[1]

The district court, however, refused to order restitution to petitioners or any other victim. Despite the word "[m]andatory" in the title of the MVRA, the district court reasoned that the MVRA "signal[s] that the Court need not – and *should* not – undertake th[e] task [of restitution] under the circumstances here." Pet. App. 12 (emphasis in original). Specifically, the district court observed that under the MVRA's "complexity exception," a court need not impose restitution:

> if the court finds, from the facts on the record, that determining complex issues of fact related to the cause or amount of the victim's

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[1] In addition to the direct victims identified at Petters' trial, the government's proposed restitution list also included hundreds of "indirect victims" who were not direct lenders to the Petters' Ponzi scheme, but rather equity investors in investment funds that loaned money to Petters, including funds that had netted profits from the Petters' scheme. Petitioners objected that indirect victims should not be included because the MVRA limits its definition of victims to those "directly and proximately harmed." The district court never ruled on this motion.

> losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

18 U.S.C. § 3663A(c)(3)(B). In the district court's view, this provision "call[ed] for 'a weighing of the burden of adjudicating the restitution issue against the desirability of *immediate* restitution – or, otherwise stated, a weighing of the burden that would be imposed on the court by adjudicating restitution in the criminal case against the burden that would be imposed on the victim by leaving him or her to other available legal remedies.'" Pet. App. 16 (quoting *United States v. Kones*, 77 F.3d 66, 69 (3rd Cir. 1996)).

Applying this balancing test, the district court first asserted that "[d]etermining the validity of the amounts claimed by each victim on the Government's final proposed restitution list . . . would take significant time and would be inherently complex." Pet. App. 14. The court then noted, on the other hand, "that alternative avenues of recovery are available to victims" here because: (1) the government has suggested that "absent a restitution order," it would institute proceedings to "remit forfeited assets"; and (2) victims might recover money in "bankruptcy proceedings involving [Petters'] companies." Pet. App. 15-16. "Hence," the district court continued, "victims have several means to recoup their losses other than restitution, before decision-makers better equipped to

resolve their claims." Pet. App. 16. The court then declined to order restitution.

The court later entered two more orders denying restitution in the co-defendants' cases for the same reasons. Pet. App. 19 ("[T]he Court DECLINES to order restitution by these Defendants. Instead, the Government may proceed through the remission process. . . ."); Pet. App. 22 (same).

Petitioners filed motions objecting to these denials of restitution, arguing that they denied them their rights under the MVRA and the CVRA. Operating under an *ad hoc* victim motions screening process that the district judge apparently created for this case only, the district court initially ignored and later denied the motions on the record. Pet. App. 23, 27.[2]

3. When a district court has denied a victim's request for restitution, the CVRA allows victims to seek a writ of mandamus from a court of appeals. 18 U.S.C. § 3771(d)(3). Accordingly, Ritchie filed timely mandamus petitions in the Eighth Circuit from each of the district court's orders denying restitution.

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[2] Victims were not allowed to e-file motions to the district court. Instead, each document presented by a victim to the clerk's office for filing was instead sent to Judge Kyle's chambers. Judge Kyle would then decide whether the clerk should file it or not. Petitioners' motions asking the court to vacate its orders denying restitution were among the victim motions handled in this manner. At co-defendant Deanna Coleman's sentencing, the district court acknowledged on the record the receipt of petitioners' motions and denied them *nunc pro tunc*.

The CVRA provides that "[i]f the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3). The Eighth Circuit, however, responded to each of petitioners' petitions with the following: "The petition for writ of mandamus has been considered by the court and is denied." Pet. App. 1, 3-4.

REASONS FOR GRANTING THE WRIT

This case seeks enforcement of victims' rights conferred upon them by the Mandatory Victim Restitution Act of 1996 and the Crime Victims Rights Act of 2004. These two statutes made revolutionary changes in the way business should be done in criminal courts – for the first time, giving crime victims enforceable rights in criminal cases. Yet federal courts are now divided over a fundamental issue that arises in implementing these new statues: whether courts may deny restitution based on a belief that the victims have alternative avenues in which they could obtain relief. This Court should use this case – in which petitioners suffered over one hundred million dollars of monetary losses as a direct result of a criminal Ponzi scheme but the district court denied restitution on the ground that "alternative avenues of recovery are available to victims," Pet. App. 15 – to resolve this conflict. The very point of the MVRA, absent tightly circumscribed exceptions, is to impose a *mandatory* requirement

that courts impose restitution. Allowing courts to abdicate that duty based on speculation that victims might obtain recompense some other way would effectively render the Act a nullity, for victims have always had the right to pursue alternative avenues of relief.

At the very least, this Court should reverse the Eighth Circuit's unreasoned denial of petitioners' mandamus petition on the ground that it flouts the CVRA's requirement that "[i]f the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3). The Eighth Circuit's decision not only deprived petitioners of any meaningful appellate review but is so contrary to plain statutory requirements that summary reversal would be appropriate.

I. This Court Should Resolve The Circuit Split Over Whether Courts May Deny Restitution Based on the Availability of Other Remedies for Possible Victim Compensation.

A. The Circuits Are Split Over This Issue.

The MVRA requires a sentencing court to impose restitution unless, as is pertinent here, "the court finds, from the facts on the record, that determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to

provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. § 3663A(c)(3)(B). Invoking this so-called "complexity exception," the district court here held that the burden of determining the amount of restitution due would outweigh "the need to provide restitution" because "alternative avenues of recovery are available to victims." Pet. App. 15. This reasoning and holding – which the Eighth Circuit summarily ratified, Pet. App. 1 & 3, and which comports with prior case law from that district court[3] – implicates an acknowledged circuit split over whether a court may deny restitution under the MVRA based on the availability of other remedies for possible victim compensation.

1. The Ninth Circuit has held that the availability of alternative remedies may *not* be considered in declining restitution under the complexity exception. In *United States v. Cienfuegos*, 462 F.3d 1160 (9th Cir. 2006), the district court denied restitution, as here, in part because it believed the victims could obtain relief in an alternative forum. The Ninth Circuit squarely rejected the district court's belief that this was permissible under the MVRA:

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[3] In *United States v. Kline*, 199 F. Supp. 2d 922, 923-928 (D. Minn. 2002), after awarding restitution to victim individuals the court declined restitution for corporate victims by invoking the complexity exception and telling corporate victims they could pursue a private lawsuit, and that if no assets remained after forfeiture the corporate victims could petition for remission to collect their judgments.

> [U]nder the MVRA the availability of a civil suit can no longer be considered by the district court in deciding the amount of restitution. . . . Thus, the district court abused its discretion by relying on the perceived complexity of the restitution determination and the availability of a more suitable forum to decline to order restitution for future lost income.

Id. at 1163; *see also United States v. Edwards*, 595 F.3d 1004, 1013 (9th Cir. 2010) (holding that a prior bankruptcy settlement does not preclude restitution under the MVRA because the MVRA requires restitution in the full amount of the victims' losses and the "settlement did not compensate [the] victims in the full amount they lost at his hands").

The Fourth Circuit has similarly rejected a defendant's request to reduce his restitution obligations by the value of forfeited property that might be made available to victims through a future remission proceeding. *United States v. Alalade*, 204 F.3d 536, 540 (4th Cir. 2000). The Fourth Circuit reasoned that whatever amount victims might receive through remission could only be used as an offset, noting that a restitution offset provided by "§ 3664(j)(2), by its terms, only comes into play after the district court has already ordered restitution in the full amount of the victim's loss." *Id.*

Finally, the First Circuit has held that a bankruptcy award, discharge or settlement cannot be taken into account in determining restitution under

the MVRA. *United States v. Hyde*, 497 F.3d 103, 108 (1st Cir. 2007). Relying on the MVRA's provision making restitution mandatory "[n]otwithstanding any other provision of law," 18 U.S.C. § 3663A, the court ruled that "neither Massachusetts law nor the Bankruptcy Code restricts the reach of the MVRA's clear language." *Hyde*, 497 F.3d at 108. If a prior bankruptcy discharge or settlement of the victim's loss cannot preclude an award of restitution under the MVRA's complexity exception, it follows that the availability of a possible remedy in a pending bankruptcy action is also irrelevant to the balancing analysis that the exception contemplates.

2. Expressly acknowledging that it disagreed with the Ninth Circuit on the issue, the Tenth Circuit has held a district court may decline to order restitution under the MVRA's complexity exception based on the availability of other remedies. *United States v. Gallant*, 537 F.3d 1202 (10th Cir. 2008). Rejecting the government's argument to the contrary, the Tenth Circuit reasoned: "While the availability of other relief is deemed irrelevant to the process of calculating the *amount* of a restitution award, it is not necessarily irrelevant to the *availability* of such an award under § 3663A." *Id.* at 1254. The Tenth Circuit thus upheld a district court's denial of restitution based in part on the availability of alternative remedies, explaining that the availability of such remedies was "relevant to the balancing test established by § 3663A(c)(3)(B)'s complexity exception" because it "lessen[s] to some degree" a victim's "need to rely

upon the sentencing process for compensation." *Id.* at 1254.

Judge Tacha wrote separately to say that although she agreed with the court's disposition on other grounds, she disagreed with its interpretation of the MVRA: "I would . . . hold that a court may not consider other sources of compensation in invoking the [MVRA's complexity] exception. In addition, because the district court in the present case clearly considered the FDIC's pending civil suit in deciding whether to apply the exception, I would hold that the court committed a legal error." *Id.* at 1255 (Tacha, J., concurring).

District courts in the Second, Third, and Sixth Circuits also have held, like the Tenth Circuit, that a court may consider availability of alternative remedies as part of the MVRA's complexity exception's balancing test. *See United States v. Schwartz*, 2006 U.S. Dist. LEXIS 33806, at *17-21 (D. Conn. May 25, 2006) (balancing burden that determining restitution would impose against the burden "that would be imposed on the victim by leaving him or her to other available legal remedies"); *United States v. Collardeau*, 2005 U.S. Dist. LEXIS 45020, at *22-23 (D.N.J. Apr. 28, 2005) (denying restitution because determining the cause and amount of losses "would prolong an already lengthy sentencing period" and "[t]hese issues are better left to the civil securities fraud action pending in the Southern District of New York"); *United States v. Warshak*, 2008 U.S. Dist. LEXIS 85888, at *2-3 (S.D. Ohio Aug. 27, 2008) (denying restitution

because "C.F.R. Part 9 provides a process whereby victims may petition for the remission of forfeited property").

B. This Issue Is Extremely Important to the Proper Operation of the MVRA.

For two primary reasons, the question presented here – whether a court may deny restitution based on the availability of other alternative remedies – is extremely important.

1. The question arises frequently, and allowing courts to deny restitution based on the availability of alternative remedies threatens to drain the MVRA of any vitality. An alternative remedy of some kind almost always exists for crime victims who are eligible for restitution under the MVRA. In order to qualify as a victim entitled to restitution under the MVRA, the person "must have standing to bring a civil action for the . . . injuries proximately caused by . . . the conduct underlying the offense of conviction." *United States v. Chalupnik*, 514 F.3d 748, 753 (8th Cir. 2008) (internal quotation marks omitted); *accord United States v. Reifler*, 446 F.3d 65, 137 (2d Cir. 2006). Accordingly, now as before the enactment of the MVRA, bringing a civil action is always a theoretical possibility for a crime victim. Furthermore, the remission process, whereby a Department of Justice official decides victim petitions and has discretion to remit to victims some of the ill-gotten gains it has seized and forfeited from criminal defendants, exists in all federal criminal

cases in which forfeiture is awarded. Finally, especially in white collar cases, defendants or some of their companies sometimes find themselves in bankruptcy proceedings, where victims can seek to recover a portion of their losses.

The very purpose of the MVRA, however, is to relieve victims of having to pursue these assorted alternative remedies. Prior to its enactment, courts had the authority to impose restitution, but all too often they declined to do so. Under the press of heavy case loads, courts simply did not want to bother with restitution. *See, e.g., United States v. Vaknin,* 112 F.3d 579, 582 (1st Cir. 1997) (noting that, prior to the MVRA, courts invoked their power to impose restitution "sparingly"). The MVRA seeks to correct that situation by *compelling* sentencing courts to award restitution when imposing criminal sentences. *United States v. Aguirre-Gonzalez,* 597 F.3d 46, 51 (1st Cir. 2010); *see also United States v. Perry*, 360 F.3d 519, 530 (6th Cir. 2004) (describing this "fundamental shift" that MVRA imposed). Hence, if the MVRA's complexity situation were to allow district courts to shirk that new responsibility upon a mere finding of complexity, then work Congress invested in enacting the MVRA would be all for naught. Sentencing courts, just as before the MVRA, could simply require victims to pursue their own remedies in any case in which the courts believe determining restitution would be burdensome.

2. Alternative remedies typically fall far short of the MVRA's guarantee of a restitution award for

the "full amount of each victim's losses," 18 U.S.C. § 3664(f)(1)(A), and the CVRA's guarantee of "full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(6). Bringing a civil suit can cost substantial money and can take years to generate relief – especially if victims want to obtain a judgment making them whole instead of a settlement giving them a fraction of what they are due. And it sometimes takes years for victims even to be allowed to bring civil suits; when faced with widespread and large-scale harm, district courts can freeze wrongdoers' assets and stay civil litigation until all criminal proceedings are complete.

The remission remedy, for its part, is a matter of executive grace, over which the Attorney General exercises unreviewable discretion. Remission petitions are decided by the chief of the Justice Department's Asset Forfeiture and Money Laundering Section ("AFMLS") – without a hearing. Among other requirements, the victim must demonstrate that he "does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property." 28 C.F.R. § 9.8(a)(5). Remission regulations further allow the chief of AFMLS to give preference to some victims over others, based on perceived need. Awards may be made to law enforcement agencies, 28 U.S.C. § 524(c)(1)(C), and even to informants, who may be paid up to 25% of the proceeds of forfeiture. 19 U.S.C. § 1619(a). Those amounts to law enforcement may be paid out of the gross forfeiture proceeds before victims are

compensated at all. Victim-petitioners may not appeal adverse decisions to any court.

Finally, when victims pursue recovery through bankruptcy proceedings, they typically have access to only a slice of a wrongdoer's assets. Even within that slice, distribution rules can vary dramatically from restitution proceedings. What is more, bankruptcy is a potential remedy that one might call a "one shot deal." Victims can recover only from the wrongdoer's pool of *then-existing* assets. "Restitution liability," by contrast, "lasts for 20 years after incarceration (or until defendant's death)," *United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998) and is non-dischargeable in bankruptcy. *Id.*

3. This case vividly illustrates these shortcomings. The victims of the Petters' Ponzi scheme did not have the option of filing civil suits against the defendants to recover their losses. At the outset of the criminal litigation, the government filed a civil fraud injunction and receivership action pursuant to 18 U.S.C. § 1345, and the court imposed a litigation stay preventing anyone from suing any of the defendants. That litigation stay remains in effect today.

Consequently, the "alternative avenues of recovery" the district court relied upon in denying restitution were limited to the pending bankruptcy cases and the remission process. Pet. App. 15-16. Yet here there are several pending bankruptcy cases involving Petters' companies. Each bankruptcy estate had its separate set of secured and unsecured creditors, and

in many instances direct victims of Petters' and his co-conspirators' fraud would have claims against only one of them. As things now stand, the assets in the bankruptcy estates fall far short of an amount sufficient to make victims whole, and once those debts are discharged in bankruptcy, without restitution orders victims will have no further recourse.

In addition, the pending bankruptcy cases will not reach the personal assets of Petters and his co-defendants, which are being held in the separate receivership action. None of the individual defendants have declared bankruptcy, and because the receivership litigation stay is still in effect, their victims cannot force them into bankruptcy. Thus, all of Petters' and his co-defendants' personal assets in the receivership estate – comprising $10-$50 million in assets – exist outside the bankruptcy estates. The coordination agreement that the district judge approved in the receivership case forfeits these assets to the federal government, which was not a victim of the fraud scheme.

It is true, as the district court suggested, that "through the remission process victims will have the opportunity to seek restitution from the same funds from which Court-ordered restitution would be made" – that is, the funds forfeited to the federal government. Pet. App. 15. But that is all petitioners have: the *opportunity to seek* compensation from the Justice Department in the remission process. Petitioners, like any victims, have no statutory right to remission at all. In the receivership case the prosecutor submitted

a letter from the AFMLS Chief, stating that "AFMLS intends to authorize the return of the *net proceeds* forfeited in this case to qualified victims." *United States v. Petters*, No. 08-CV-5348, Doc. 1454-1 (emphasis added). By using "net proceeds" instead of "gross proceeds" the government signaled that it intends to pay law enforcement costs first, before any discretionary awards to victims.

Finally, even if petitioners could obtain some money from a bankruptcy court or some amount of remission from the government, they could not obtain relief that would be enforceable against Petters' or his co-defendants' future earnings and assets. In particular, four of the co-defendants received sentences of less than seven and one-half years in prison. Two were sentenced to 366 days (meaning they will be eligible for good time credit and could be released within ten and one-half months). Unless petitioners are able to secure relief though a restitution order, these defendants will be released from prison debt-free, long before their income-earning years come to an end.

C. The Courts Below Erred in Denying Restitution Based on the Possibility of Alternative Remedies.

The Eighth Circuit's decision condoning the district court's denial of restitution based on the availability of alternative remedies contravenes the text, structure, and purpose of the MVRA.

The MVRA's complexity exception allows courts to forego imposing restitution only if they find that the burden of determining the proper amount of restitution outweighs "the need to provide restitution to [a] victim." 18 U.S.C. § 3663A(c)(3)(B). The plain import of this language is that courts may weigh the burden of calculating restitution only against whether a victim's losses are so insubstantial or speculative that restitution is not important. The question of whether a victim who has suffered substantial losses could try to recover those losses in some other forum is irrelevant to this equation.

Other provisions of the MVRA confirm this analysis. As an initial matter, the MVRA requires courts to impose restitution "[n]otwithstanding any other provision of law." 18 U.S.C. § 3663A(a)(1). Accordingly, the possibility that another provision of law might allow a victim to seek compensation is irrelevant to whether a court must award restitution.

More specifically, subsection 3664(f)(1)(B) of the MVRA provides that "[i]n no case shall the fact that a victim has received or is entitled to receive compensation for a loss from insurance or any other source be considered in determining the amount of restitution." 18 U.S.C. § 3664(f)(1)(B). This prohibition against considering whether a victim "is entitled to receive compensation . . . from any other source" obviously covers alternative remedies. The Tenth Circuit tried to avoid the import of this provision by asserting that it applies only to determining the *amount* of restitution, not to *whether* restitution should be awarded in

the first place. *Gallant*, 537 F.3d at 1254. But as Judge Tacha responded in her separate opinion, this parsing of the statutory language makes no sense: if courts cannot reduce a restitution award to some lower amount based on the availability of alternative remedies, they surely cannot reduce such an award to zero by denying restitution altogether on this ground. *Id.* at 1255 (Tacha, J., concurring).

Indeed, as suggested just above, considering the availability of alternative remedies in conducting the balancing that the MVRA's complexity exception requires would defeat the whole purpose of the MVRA, as well as the CVRA's provisions relating to restitution. The objective of the MVRA is to "ensure" that courts award restitution, *Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010), in contrast to the previous system in which courts had discretion over whether to do so or to simply leave victims to seek compensation on their own. The CVRA likewise emphasizes that victims have "[t]he *right* to full and timely restitution as provided by law." 18 U.S.C. § 3771(a)(6) (emphasis added). If courts, just as before the enactment of these major pieces of legislation, could deny restitution whenever they believed, on balance, that leaving crime victims to seek alternative remedies was a reasonable result, then the MVRA and CVRA would have accomplished nothing.

The district court's own reasoning here proves the point. The district court claimed the authority to consider the availability of alternative remedies as a factor in the MVRA's complexity exception based on

the Third Circuit's opinion in *United States v. Kones*, 77 F.3d 66 (3rd Cir. 1996). *See* Pet. App. 13-14, 16. The Third Circuit stated there that courts should "weigh[ ] the burden that would be imposed on the court by adjudicating restitution in the criminal case against the burden that would be imposed on the victim by leaving him or her to other available legal remedies." *Kones*, 77 F.3d at 69. The Third Circuit, however, was discussing *the pre-MVRA discretionary restitution statute*, 18 U.S.C. § 3663 (1982), under which the availability of alternative remedies was a legitimate consideration.[4] The district court overlooked this fact and, by doing so, rendered the MVRA a nullity.

II. The Eighth Circuit Flouted The CVRA's Written-Opinion Requirement By Denying Petitioners' Mandamus Petitions Without a Written Opinion.

When a district court denies a victim's request for restitution, the CVRA allows the victim to seek a writ of mandamus from a court of appeals. 18 U.S.C. § 3771(d)(3). The CVRA further provides in the same provision that "[i]f the court of appeals denies the relief sought, the reasons for the denial shall be

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[4] The statute that *Kones* construed *prohibited* courts from imposing "restitution with respect to a loss for which the victim has received *or is to receive compensation*." 18 U.S.C. § 3663(e) (1982) (emphasis added).

clearly stated on the record in a written opinion." 18 U.S.C. § 3771(d)(3).

Senator Jon Kyl of Arizona (with two co-authors) explained in a recent law review article that the purpose of this provision of the CVRA is to ensure that victims may obtain appellate review of denials of restitution and to ensure that courts of appeals take these appeals seriously. *See* Jon Kyl et al., *On The Wings Of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581, 587 (2005). As Senator Kyl further made clear on the Senate floor in support of the CVRA's passage: "[W]hile mandamus is generally discretionary, this provision means that courts must review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to broadly defend the victims' rights." 150 Cong. Rec. S10912.[5] A written opinion, of course, also enables meaningful review by a higher court regarding whether the court properly interpreted and applied the MVRA.

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[5] In other contexts, the mandamus remedy is an extraordinary and discretionary remedy. The CVRA alters this general rule and mandates that the writs be "take[n] up and decide[d]." This is consistent with the CVRA's goal of testing the rights established and creating a body of case law construing them.

Kyl, Twist & Higgins, p. 619.

The Eighth Circuit, however, responded to each of petitioners' petitions for mandamus with the following: "The petitions for writ of mandamus have been considered by the court and are denied." Pet. App. 1, 4. It did this despite petitioners' having explained in their final mandamus petition that "[p]ursuant to the Crime Victims Rights Act, . . . '[i]f the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.' 18 U.S.C. § 3771(d)(3)." Petrs. CA8 Br. 4.

This defiance of federal law is inexcusable and demands reversal – either in conjunction with plenary review and a ruling on the merits of the first question presented or at least on its own. If this Court takes the latter approach, summary reversal may be appropriate.

Other courts of appeals have had no difficulty understanding and abiding by the CVRA's written-opinion requirement. *See, e.g., United States v. Kenna*, 453 F.3d 1136, 1137 (9th Cir. 2006) (denying mandamus in written opinion and noting at the outset that "if we deny the relief sought, 'the reasons for the denial shall be clearly stated on the record in a written opinion'") (quoting § 3771(d)(3)); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 52 (1st Cir. 2010) (same). This Court should require the Eighth Circuit to abide by this law as well.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for the writ of certiorari.

RESPECTFULLY SUBMITTED this 1st day of December, 2010.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-3050

In re: Ritchie Special Credit Investments, Ltd.; Rhone Holdings II, Ltd.; Yorkville Investments I, LLC; Ritchie Capital Structure Arbitrage Trading, Ltd.; Ritchie Capital Management, Ltd.; Ritchie Multi-Manager Trading, Ltd.; Ritchie Structured Multi-Manager, Ltd.

Petitioners

Appeal from U.S. District Court
for the District of Minnesota – St. Paul

(0:08-cr-00364-RHK-1)

(0:08-cr-00299-RHK-1)

(0:08-cr-00302-RHK-1)

(0:08-cr-00304-RHK-1)

(0:08-cr-00320-RHK-1)

(0:09-cr-00243-RHK-1)

(0:09-cr-00269-RHK-1)

JUDGMENT

Petition for writ of mandamus has been considered by the court and is denied.

September 24, 2010

Order Entered at the
Direction of the Court:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans

[ROGER L. WOLLMAN,
LAVENSKI R. SMITH
and DUANE BENTON]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-2286

In re: Ritchie Special Credit Investments, Ltd.; Rhone Holdings II, Ltd.; Yorkville Investments I, LLC; Ritchie Capital Structure Arbitrage Trading, Ltd.; Ritchie Capital Management, Ltd.; and Ritchie Capital Management, L.L.C.

Petitioners

No: 10-2365

In re: Ritchie Special Credit Investments, Ltd.; Rhone Holdings II, Ltd.; Yorkville Investments I, LLC; Ritchie Capital Structure Arbitrage Trading, Ltd.; Ritchie Capital Management, Ltd.; and Ritchie Capital Management, L.L.C.

Petitioners

No: 10-2582

In re: Ritchie Capital Management, L.L.C.; Ritchie Special Credit Investments, Ltd.; Rhone Holdings II, Ltd.; Yorkville Investments I, LLC; Ritchie Capital Structure Arbitrage Trading,Ltd.; Ritchie Capital Management, Ltd.; Ritchie Multi-Manager Trading, Ltd.; and Ritchie Structured Multi-Manager, Ltd.

Petitioners

Appeal from U.S. District Court
for the District of Minnesota – St. Paul
(0:08-cr-00364-RHK-1)
(0:08-cr-00299-RHK-1)
(0:08-cr-00302-RHK-1)
(0:08-cr-00304-RHK-1)
(0:08-cr-00320-RHK-1)
(0:09-cr-00243-RHK-1)
(0:09-cr-00269-RHK-1)

JUDGMENT

The petitions for writ of mandamus have been considered by the court and are denied.

The motions for stay are also denied. The mandates shall issue forthwith.

August 03, 2010

Order Entered at the
Direction of the Court:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans

[ROGER L. WOLLMAN,
LAVENSKI R. SMITH
and DUANE BENTON]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America, Plaintiff, v. **Thomas Joseph Petters,** Defendant.	Docket No. 08-CR-364 (RHK/AJB) **ORDER**

This matter is before the Court *sua sponte*.

Following the Defendant's conviction, the Government moved to defer the issue of restitution[1] until 60 to 90 days after sentencing. (*See* Doc. No. 370.) This was due to the "complexity, duration, and scope of the offense," which made "identification of all victims and their respective losses" difficult to determine. (*Id.* at 1.)[2] Pursuant to its authority under 18 U.S.C. § 3664(d)(5), the Court granted the Government's Motion and continued the restitution issue for

[1] The term "restitution" means "the act of making good or giving equivalent [value] for any loss, damage, or injury." Black's Law Dictionary 1313 (6th ed. 1990). Under the Mandatory Victims Restitution Act ("MVRA"), defendants convicted of certain crimes are required to make restitution to their victims, with limited exceptions discussed in more detail below. *See* 18 U.S.C. § 3663A.

[2] The Defendant was convicted of twenty counts of mail fraud, wire fraud, money laundering, and conspiracy in connection with a multi-billion-dollar Ponzi scheme lasting more than a decade.

60 days following sentencing, to June 9, 2010. (*See* Doc. No. 375.)

The Government later requested that the Court set a "restitution schedule." Noting the "complexity" of the issue, it asked the Court to approve a schedule requiring the Government to submit a preliminary restitution order six weeks before the restitution hearing, after which victims would be permitted to object, the Government and the Defendant could respond to the objections, and the Court would then consider the objections at the hearing. (*See* Doc. No. 393.) In light of "the complexity and nature of the [victims'] claims," the Court approved this schedule by Order dated April 8, 2010 (Doc. No. 398).

Meanwhile, the United States Probation Office prepared the Defendant's pre-sentence investigation report ("PSI"). The PSI included a victim list identifying the individuals and entities purportedly entitled to restitution as a result of the Defendant's fraud. Although the PSI indicated that "the total amount of restitution is at least $1.8 billion," the losses contained on the victim list totaled slightly under $900 million. This discrepancy was due to the fact that no loss amount was specified for approximately half of the individuals/entities identified as victims.[3] Neither

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[3] By the Court's count, there were 338 victims identified on the victim list appended to the PSI, running the gamut from individuals to hedge funds, retirement funds, and other sophisticated investment entities.

the PSI nor the victim list contained any indication how the loss amounts were calculated or where the documents supporting the loss figures could be found, and no documents substantiating the amounts were submitted with the PSI.[4]

On April 28, 2010, the Government filed its proposed preliminary restitution order, attaching a list identifying 434 victims seeking just under $2 billion in restitution. The victim list differed in several ways from that appended to the PSI, including identifying new victims, removing others, increasing the amount sought for some victims, and decreasing it for others. As an example, the amount sought for one victim dropped by approximately *$90 million*. Despite the additional time the Government had requested before submitting its preliminary order, it provided no explanation for these changes and acknowledged that the list was "based on information that is currently available," which "[i]n some instances . . . may be incomplete." (Doc. No. 410 at 2.)

Pursuant to the Court's restitution schedule, victims were then afforded the opportunity to object

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[4] By way of reminder, the trial in this action lasted approximately five weeks and involved scores of boxes (and millions of pages) of documents. See Fed. R. Crim. P. 32(b)(1)(B) (probation officer must "conduct an investigation and submit a report that contains sufficient information for the court to order restitution"); 18 U.S.C. § 3664(a) (PSI shall contain "information sufficient for the court to exercise its discretion in fashioning a restitution order," including "a complete accounting of the losses to each victim").

to the preliminary restitution order; nearly 100 did so. In response, the Government has now filed its "final" proposed restitution order, along with the objections. While the Government has "accepted" many objections and "not accepted" others, the record does not provide much (if any) information about the basis for the objections or the Government's reasons for accepting/rejecting them. For instance, the Government has removed from the victim list one objector who it claims was a "net winner."[5] The Court, however, has not been directed to any documents or other evidence to support that conclusion.

Moreover, the "final" victim list contains approximately 40 additional victims not previously disclosed, and the amount of restitution sought has increased or decreased in several instances without any obvious explanation. The total amount of restitution is now more than $500 million greater than that on the preliminary list.

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[5] Victims were determined using a "cash in/cash out" method. In other words, the Government looked at the funds "provided by an investor to the Petters fraud (directly or through investment funds) less any payment received by the investor." (Doc. No. 456 at 1-2.) If this amount was greater than zero – that is, if the investor provided more money to the fraud scheme than he/she/it received back – then the investor would be deemed a victim. If, on the other hand, the amount of money received from the fraud exceeded that invested, then the investor would be a "net winner" and, accordingly, would not be deemed a victim under the Government's calculus.

The Government has attempted to provide some explanations for these changes, but many leave the Court wanting. For example, one victim's initial claim was more than $320 million, which was reduced to approximately $139 million on the Government's preliminary victim list. With its final list, however, that victim (and its large claim, which accounts for over 5% of the restitution total) has been deleted entirely. The Government's ostensible basis for doing so is the following cursory explanation: "Claim withdrawn." Besides having difficulty accepting that one would be willing to easily forego a nine-figure sum, the Court finds nothing in the record to support the assertion that the victim has decided to drop its restitution claim.

These are but a handful of examples demonstrating why a restitution order is a thorny proposition here. Putting aside that determining precisely who is a "victim" is itself a challenge,[6] the Court has not

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[6] Under the MVRA, a "victim" is "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. § 3663A(a)(2). A person who suffers incidental or consequential damages is not a "victim" under the statute. *United States v. Refert*, 519 F.3d 752, 759 (8th Cir. 2008). Here, it is questionable whether investors in hedge funds that in turn invested in the Defendant's fraud – so-called "indirect investors" – are "victims" under the statute. Given how broadly the Eighth Circuit construes the term "victim," however, the Court believes that "indirect investors" fall within the statutory definition. See, e.g., *United States v. Waldner*, 580 F.3d 699, 710 (8th Cir. 2009) ("We take a broad view of what conduct and related loss amounts can be included.") (quoting *United*

(Continued on following page)

been provided with sufficient information to verify whether the amounts sought by the victims are accurate. The Court cannot blindly accept the Government's representations as to loss without some evidentiary basis, even if the amounts sought are unobjected to. Rather, "[w]hen an MVRA victim is identified, the government must prove 'the amount of the loss sustained by [the] victim as a result of the offense' by a preponderance of the evidence." *United States v. Chalupnik*, 514 F.3d 748, 754 (8th Cir. 2008) (quoting 18 U.S.C. § 3664(e)); *accord, e.g., United States v. Young*, 272 F.3d 1052, 1056 (8th Cir. 2001) (vacating restitution award based upon victim's estimated lost profits incorporated into pre-sentence investigation report, even though the victim opted not to testify at restitution hearing, because government failed to sustain its burden of proof). Restitution "by its nature requires the calculation of [the] precise dollar amount" lost by each victim, *United States v. Moore*, 315 Fed. Appx. 16, 20 (9th Cir. 2008) (Bea, J., dissenting); *accord, e.g., Young*, 272 F.3d at 1056 (vacating restitution award based on "uncertain estimate"),[7] because the Court cannot order restitution in an amount greater than the victims' losses, 18 U.S.C. § 3664(f)(1)(A). The record here simply does

States v. DeRosier, 501 F.3d 888, 896 (8th Cir. 2007)); *United States v. Piggie*, 303 F.3d 923, 928 (8th Cir. 2002).

[7] But see *United States v. Gallant*, 537 F.3d 1202, 1252 (10th Cir. 2008); *United States v. Vaknin*, 112 F.3d 579, 587 (1st Cir. 1997).

not suffice for the Court to make that determination for each of the identified victims.

Moreover, even if the Government were to now supplement the record to address these concerns, the Court would not be relieved of its obligation to review the dozens of victim objections – even those "accepted" by the Government – that have been filed. As it stands, the Court is in no position to sustain or overrule those objections without conducting evidentiary hearings, a lengthy and complicated process at best given the number of objections and the amounts at stake. *See* 18 U.S.C. § 3664(d)(4) (court "may require additional documentation or hear testimony" in setting restitution); 18 U.S.C. § 3771(a)(4) (crime victims enjoy "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing").

Although the Court would be ready, willing, and able to determine each victim's restitution award and resolve the outstanding objections if the record were to be supplemented as discussed above, Congress has signaled that the Court need not – and *should not* – undertake that task under the circumstances here. In enacting the MVRA, Congress made clear that district courts should not be saddled by complicated fact-finding with regard to victim loss when ordering restitution. Specifically, despite its name, the MVRA provides that restitution is *not* required

> if the court finds, from the facts on the record, that determining complex issues of fact

> related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

18 U.S.C. § 3663A(c)(3)(B). This exception recognizes that restitution is "essentially a civil remedy created by Congress and incorporated into criminal proceedings *for reasons of economy and practicality*." *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) (emphasis added). It reflects "Congress's intention that the process of determining an appropriate order of restitution be 'streamlined,' and that the restitution 'determination be made quickly.'" *United States v. Reifler*, 446 F.3d 65, 136 (2d Cir. 2006) (citations omitted). By including this exception in the MVRA, Congress "hoped to avoid creating a system that would, essentially, turn sentencing hearings into complicated, prolonged trials of the normal civil variety." *United States v. Gordon*, 393 F.3d 1044, 1060 (9th Cir. 2004) (Fernandez, J., concurring and dissenting). Simply put, "*Congress plainly intended that sentencing courts not become embroiled in intricate issues of proof*" related to restitution. *Reifler*, 446 F.3d at 136 (emphasis added); *see also United States v. Kones*, 77 F.3d 66, 69 (3rd Cir. 1996) (discussing similar provision in the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663(a); "[I]t was expected that entitlement to restitution could be readily determined by the sentencing judge based

upon the evidence he had heard during the trial of the criminal case.").[8]

This exception is particularly apt here. Determining the validity of the amounts claimed by each victim on the Government's final proposed restitution list, including the dozens who have objected to the Government's calculations, would take significant time and would be inherently complex, as the Government has twice conceded. Restitution has already been delayed for nearly two months post-sentencing, and the Court believes that it would take *at least* that long to marshal the necessary evidence, resolve all of the many pending objections, and determine the appropriate amount of restitution for each victim, including affording victims the opportunity to be heard. By statute, restitution orders are to be made within 90 days of sentencing, 18 U.S.C. § 3664(d)(5), and that is highly unlikely to occur here if the record is to be adequately supplemented.

Furthermore, even were the Court to wade into this thicket in an attempt to determine the appropriate amount of restitution for each victim, the end result would be meager. The Government has made clear that "restitution payments will represent only a small fraction of the total restitution order," since the

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[8] Because of the nearly identical language in the VWPA and the MVRA, courts often look to cases construing the former when interpreting the latter. *E.g.*, *United States v. Oslund*, 453 F.3d 1048, 1063 (8th Cir. 2006).

assets available for restitution are estimated to be worth approximately $10-20 million (out of more than $2 billion in restitution sought). (Doc. No. 456 at 7.) In other words, restitution will, at best, result in the recovery of something less than a penny for each dollar of victim loss. In assessing whether to decline to order restitution due to complexity or undue delay, the court must evaluate "the need to provide restitution to any victim." 18 U.S.C. § 3663A(c)(3)(B). Here, the need for restitution is limited by its probable value, and the victims needing it most – unsophisticated individual investors who saw their life savings frittered away by the Defendant's fraud – likely would recover the smallest amounts, since the vast majority of losses were suffered by hedge funds and similar entities.

The Court also notes that alternative avenues of recovery are available to victims. The Government has previously suggested that, absent a restitution order, it would invoke its authority under Part 9 of Title 28 of the Code of Federal Regulations to remit forfeited assets – the same assets making up the pool of restitution funds – to victims. (*See* Doc. No. 393 at 3 n.1.)[9] In other words, through the remission process victims will have the opportunity to seek restitution from the same funds from which Court-ordered

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[9] Under the "remission" process, a crime victim may seek assets that have been forfeited by the Government as a result of a criminal offense in order to make up for the victim's loss. *See generally* 28 C.F.R. § 9.8.

restitution would be made. In addition, bankruptcy proceedings involving the Defendant's companies are currently pending, in which many of the victims have already asserted claims. The United States Trustee's Office "plans to assist all victims . . . in filing a bankruptcy claim (if a victim has not filed one already)." (Doc. No. 456 at 10 n.5.) And the funds available for distribution in the bankruptcy proceedings likely will far outpace those available here, since "clawbacks" and similar litigation are to take place there. (*See* Doc. No. 456 at 10 (noting that "there could be substantial distributions to the bankruptcy creditors through the bankruptcy proceedings").) Hence, victims have several means to recoup their losses other than restitution, before decision-makers better equipped to resolve their claims.[10]

At bottom, Section 3663A(c)(3)(B) calls for "a weighing of the burden of adjudicating the restitution issue against the desirability of *immediate* restitution – or, otherwise stated, a weighing of the burden that would be imposed on the court by adjudicating restitution in the criminal case against the burden that would be imposed on the victim by leaving him or her to other available legal remedies." *Kones*, 77 F.3d at 69. The burden imposed on the Court by ordering restitution here would be significant. At this juncture,

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[10] Indeed, it would be a waste of resources to order restitution of pennies on the dollar (at best) when most victims have filed, or will be filing, parallel claims in the bankruptcy proceedings.

the Court "simply does not have the factual record at its disposal to craft a restitution order without prolonging [the matter] for an intolerable period of time." *United States v. Collardeau*, No. Crim. 03-800, 2005 WL 1106475, at *8 (D.N.J. Apr. 28, 2005). On the other hand, the burden imposed on victims by declining restitution would not be overwhelming. While the Court is not unsympathetic to their plight, the victims have alternative avenues available to them, including one in which many victims have already asserted claims (bankruptcy). The amount of money at stake here, relative to their claims, is small. The benefits of a restitution order, therefore, would be minimal in the overall scheme of this case.

For these reasons, the Court concludes that, on balance, determining complex issues of fact related to the amount of the victims' losses would both complicate and prolong the sentencing process to such a degree that the need to provide restitution is outweighed by the burden it would impose. 18 U.S.C. § 3663A(c)(3)(B). Based on the foregoing, and all the files, records, and proceedings herein, the Court **DECLINES** to order restitution. Instead, the Government may proceed through the remission process, as authorized in 21 U.S.C. § 853(j) and 28 C.F.R. Part 9. The restitution hearing currently scheduled for June 9, 2010, is **CANCELED**. The Government is **DIRECTED** to forward a copy of this Order to each

victim identified on its final proposed restitution order.[11]

Dated: June 3, 2010

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

[11] Shortly before the Court issued this Order, the Defendant filed a position statement (Doc. No. 458) advocating for the same result reached here: no restitution. Nevertheless, the Court bases its decision on the complexity and length of the restitution process, not on the Defendant's arguments.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

v. **ORDER**

Robert Dean White,

Defendant, Crim. No. 08-299 (RHK)

Michael Catain,

Defendant, Crim. No. 08-302 (RHK)

Deanna Lynn Coleman,

Defendant, Crim. No. 08-304 (RHK)

Larry Reynolds,

Defendant. Crim. No. 08-320 (RHK)

The Defendant in each of these cases has pleaded guilty in connection with a fraud scheme for which Thomas Joseph Petters was convicted by jury of 20 counts of wire fraud, mail fraud, money laundering, and conspiracy (Crim. No. 08-364). By Order dated June 3, 2010 (Doc. No. 459), the Court declined to order restitution in the Petters matter. In the Court's view, the reasons for declining a restitution order in Petters are equally applicable with respect to these Defendants. Accordingly, for the reasons stated in the Court's June 3, 2010 Order in Petters, which are expressly adopted herein by reference, the Court DECLINES to order restitution by these Defendants. Instead, the Government may proceed through the

remission process, as authorized in 21 U.S.C. § 853(j) and 28 C.F.R. Part 9.

Dated: June 4, 2010

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

v. **ORDER**

Harold Katz,

Defendant, Crim. No. 09-243 (RHK)

Gregory Bell,

Defendant, Crim. No. 09-269 (RHK)

The Defendant in each of these cases has pleaded guilty in connection with a fraud scheme for which Thomas Joseph Petters was convicted by jury of 20 counts of wire fraud, mail fraud, money laundering, and conspiracy (Crim. No. 08-364). By Order dated June 3, 2010 (Doc. No. 459 in Crim. No. 08-364), the Court declined to order restitution in the Petters matter, concluding that "determining complex issues of fact related to the amount of the victims' losses would both complicate and prolong the sentencing process to such a degree that the need to provide restitution is outweighed by the burden it would impose." (Id. at 10-11 (citing 18 U.S.C. § 3663A(c)(3)(B)).) The Court later issued a similar Order declining to order restitution by Robert White, Michael Catain, Larry Reynolds, and Deanna Coleman, each of whom participated in the Petters fraud and pleaded guilty in connection therewith.

The Court has now been informed by the Probation Officer that the list of victims of the crimes for which Defendants Katz and Bell have pleaded guilty overlaps in substantial measure, although not entirely, with that in Petters. Moreover, the Court is informed that there have been more than three dozen objections to the Probation Officer's calculations of the appropriate restitution amounts. While resolving those objections would not require as Herculean an effort as that presented by the 100+ objections in Petters, the Court believes that the same problems endemic to restitution in that case are evident here. Simply put, although the universe of victims and objections is smaller, the reasons for declining a restitution order in Petters are equally applicable with respect to these Defendants.

Accordingly, for the reasons stated in the Court's June 3, 2010 Order in Petters and in its June 4, 2010 Order in White, Catain, Reynolds, and Coleman, which are expressly adopted herein by reference, the Court DECLINES to order restitution by these Defendants. Instead, the Government may proceed through the remission process, as authorized in 21 U.S.C. § 853(j) and 28 C.F.R. Part 9.

Dated: July 2, 2010

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	File No. 08 CR 304 (RHK)
Plaintiff,	Saint Paul, Minnesota
vs.	September 2, 2010
DEANNA LYNN COLEMAN,	9:30 a.m.
Defendant.	

BEFORE THE HONORABLE RICHARD H. KYLE
UNITED STATES DISTRICT COURT JUDGE
(SENTENCE HEARING)

APPEARANCES

For the Plaintiff: UNITED STATES ATTORNEY
JOSEPH T. DIXON, AUSA
TIMOTHY RANK, AUSA
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PROCEEDINGS

IN OPEN COURT

THE COURT: Before we get underway, let me just remind those of you who are in attendance here today that we do not allow cell phones or other recording devices in the courtroom; and if anybody does have a cell phone, please make sure that it is off so that we don't have an interruption during the course of these proceedings.

We're here on United States of America versus Deanna Lynn Coleman, criminal file number 08-304. Let's start with the appearances for the United States.

MR. DIXON: Joe Dixon and Tim Rank for the United States. Good morning, your Honor.

THE COURT: Good morning, counsel. And for the Defendant.

MR. CAPLAN: Alan Caplan, your Honor, representing Ms. Coleman.

THE COURT: And Ms. Coleman is also present.

MR. CAPLAN: She is, your Honor.

THE COURT: Good morning to both of you. We are here for imposition of sentence, the Defendant having been previously – why don't you be seated, Counsel – the Defendant having previously entered a plea of guilty on October 8th of 2008 to a one-count

information charging her with conspiracy to commit mail fraud in violation of Title 18, United States Code, Section 371. And the presentence investigation report has been completed and so we're now here for sentencing. I think I would like to start by finding out from Counsel, particularly Mr. Dixon, what you have heard with respect to any victims who wish to be heard here this morning.

MR. DIXON: My understanding is that representatives of Ritchie Lenders, there's a variety of Ritchie Lenders –

THE COURT: Right.

MR. DIXON: – are here. They are right here. Tom Cronin from Illinois is here.

MR. CRONIN: Good morning, your Honor.

THE COURT: Good morning, Mr. Cronin.

MR. DIXON: And I'm not aware of any other victims that wish to be heard this morning. Obviously, as the Court knows, we support any right and wish of the victims to be heard subject to the Court fashioning procedures.

THE COURT: Would you like to be heard now or do you want to wait until we get into the middle of the proceedings? What's your pleasure?

MR. CRONIN: Whatever the Court's pleasure.

THE COURT: Why don't we start with you.

MR. CRONIN: Thank you, your Honor. Thomas Cronin, Gary Vale (phonetically spelled) and Jennifer Wilson on behalf of, as Mr. Dixon said, Ritchie Capital Management.

THE COURT: That podium, if it is better for you, goes up a little bit.

MR. DIXON: He is a little taller than I am, Judge.

THE COURT: We'll bring it back for you, Mr. Dixon.

MR. DIXON: Thank you.

MR. CRONIN: Thank you. On behalf of Ritchie Capital Management, a fund manager and related entities, the names of the entities we represent are set forth in a motion pursuant to the Crime Victims Act that I understand has now been filed today, so I won't repeat or belabor the arguments made there but I wanted to make a few points.

THE COURT: Let me make sure, there was a motion – it seems that I saw a couple of motions by Ritchie. One to be heard and another one to either revisit or vacate the restitution order. Something to that effect. Which are we going to talk about here today?

MR. CRONIN: We're going to talk about the motion pursuant to the Crime Victims Act to vacate the restitution orders, your Honor. We feel we've never –

THE COURT: Wait, wait, wait. The restitution order was entered. You people objected to it. You asked me to vacate, as I recall, at that time. I denied it. You filed a writ of mandamus with the Eighth Circuit, and they turned you down. I'm not going to revisit that issue. As far as I'm concerned, the restitution issue is behind us.

MR. CRONIN: Your Honor, most respectfully, we think we have a right to be heard on that. Procedurally that we've never had a chance to do it. Restitution under the act –

THE COURT: Why didn't you do it after the order was issued instead of going to the Eighth Circuit right away?

MR. CRONIN: We did file a motion to try to vacate it.

THE COURT: What did I do to it?

MR. CRONIN: I don't think it was ever ruled upon, your Honor.

THE COURT: I'll deny it now then if you want me to nunc pro tunc. I'm not going to listen to you with respect to the restitution. You can talk about you're here, you're representing the victims. You can talk about your view as to what the victims – how that might impact the sentence in this case, and that's the only issue that I'm going to hear from. So if that's all you have to say, then I think you're going to have a very short appearance here today.

MR. CRONIN: Well, your Honor, if I may, let me talk about the flipside then, the procedure and forfeiture that brings us here today. I mean, basically we think that – and I won't use the word restitution, but we think that we have a right to be heard on the fact of the Defendant's obligations to repay victims what's been lost here. We're not here to address really the Defendant's request for leniency on jail time or the Government's position on that either.

THE COURT: Then you're not going to be heard this morning.

MR. CRONIN: Your Honor, frankly, most respectfully I would ask the Court's indulgence simply to make a record. We think that this is a very important issue for victims. Ritchie Capital Management – the evidence used in the trial that the Defendant Coleman testified to shows that Ritchie was involved and lost up to 200 million dollars.

THE COURT: I don't think there is any doubt that Ritchie lost the money. That's not the issue. That's not in doubt, I don't think. Ritchie lost money and so did a lot of people that invested with Ritchie lost money.

MR. CRONIN: Yes, your Honor.

THE COURT: We're not going to visit that issue. If you want to talk about sentencing as a victim and the impact of what happened here might have on the sentencing I'll hear you. But I'm not going to go back and talk about the restitution issue or forfeiture

issue. Those are behind us. If you want to file something with the Court afterwards and make your record you can do it that way. But we're not going to take up my time and the time of everybody here in the audience.

MR. CRONIN: Your Honor, can I confirm that our motion to vacate your order has been filed?

THE COURT: I have been told that it's been filed.

MR. DIXON: Your Honor, I think it's in the process right now. It will be filed this morning with the clerk of the court in the court file.

THE COURT: So it will be filed.

MR. CRONIN: Your Honor, if I can ask the Court's indulgence, can I make a very brief point?

THE COURT: I don't think you are capable of making a very brief point. That's not the impression I have. I'm not going to get into that issue, and I don't know how I can make it any clearer except to say no.

MR. CRONIN: Your Honor, I –

THE COURT: You respectfully disagree.

MR. CRONIN: I respectfully disagree. I think the Crime Victims Act, Mandatory Restitution Act allows us to have an opportunity to –

THE COURT: The restitution issue, I said I decline to issue a restitution order. I sent the matter out to Washington. You can go out to Washington and argue about it, you can talk to the Bankruptcy Court about it, but it's out of my hands at this stage. You tried to get it back in and you went to the Eighth Circuit and they said no.

MR. CRONIN: We've never been heard on it, your Honor. We've never had an opportunity to address the Court on this point and that's what the Crime Victims Act permits us to do.

THE COURT: Well, I'm not going to let you do it. Okay. Any other victims you're aware of, Mr. Dixon?

Anybody else here in the audience who considers themselves a victim?

MR. DIXON: Your Honor, I don't see any victims and I think we can move forward.

* * *

Statutes

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to –

(i) the greater of –

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim –

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

(A) that is –

(i) a crime of violence, as defined in section 16 [18 USCS § 16];

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 [18 USCS § 1365] (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that –

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664 [18 USCS § 3664].

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18 U.S.C. § 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate

report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter [18 USCS §§ 3661 et seq.], chapter 227 [18 USCS §§ 3551 et seq.], and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable –

(A) provide notice to all identified victims of –

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for

the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572 [18 USCS § 3572], specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of –

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of –

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in –

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title [18 USCS §§ 3571 et seq. and 3611 et seq.]; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that –

(1) such a sentence can subsequently be –

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 [18 USCS § 3742] of chapter 235 of this title;

(B) appealed and modified under section 3742 [18 USCS § 3742];

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A [18 USCS § 3664(k), 3572, or 3613A]; or

(2) the defendant may be resentenced under section 3565 or 3614 [18 USCS § 3565 or 3614].

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A [18 USCS §§ 2248, 2259, 2264, 2327, 3663, and 3663A] and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

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§ 3771. Crime victims' rights

(a) Rights of crime victims. A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that

testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights afforded.

(1) In general. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings.

(A) In general. In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) Enforcement.

(i) In general. These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) Multiple victims. In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) Limitation. This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) Definition. For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) Best efforts to accord rights.

(1) Government. Officers and employees of the Department of Justice and other departments and

agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney. The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice. Notice of release otherwise required pursuant to this chapter [this section] shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and limitations.

(1) Rights. The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter [this section].

(2) Multiple crime victims. In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter [this section] that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus. The rights described in subsection (a) shall be asserted in

the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter [this section]. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error. In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief. In no case shall a failure to afford a right under this chapter [this section] provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if –

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action. Nothing in this chapter [this section] shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter [this section] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions. For the purposes of this chapter [this section], the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter [this section], but in no event shall the defendant be named as such guardian or representative.

(f) Procedures to promote compliance.

(1) Regulations. Not later than 1 year after the date of enactment of this chapter [enacted Oct. 30, 2004], the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents. The regulations promulgated under paragraph (1) shall –

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be

no judicial review of the final decision of the Attorney General by a complainant.